Supreme Court, U.S.
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No. 02-281

IN THE

Supreme Court of the United States

INYO COUNTY, A PUBLIC ENTITY; PHIL MCDOWELL, Individually and as District Attorney; DAN LUCAS, Individually and as Sheriff,
Petitioners,

v.

PAIUTE-SHOSHONE INDIANS OF THE BISHOP COMMUNITY OF THE BISHOP COLONY; and BISHOP PAIUTE GAMING CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF BISHOP PAIUTE TRIBE AND BISHOP PAIUTE GAMING CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether county officers may execute a search warrant issued by a state court against an Indian tribe and tribally-owned gaming enterprise located on reservation trust lands to seize personnel records related to employees who are tribal members in violation of the Tribe's sovereign immunity and in derogation of the Tribe's policies governing the privacy of employee personnel records?

2. May the Tribe or a tribal corporation bring suit under 42 U.S.C. § 1983 for violation of its rights secured by the Fourth Amendment to the United States Constitution?

3. Whether the county officers who executed the search warrant are entitled to qualified immunity under 42 U.S.C. § 1983?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited by Petitioners, this case involves the following:

1. Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

This statute provides for the regulation of gambling activities on Indian lands. Relevant excerpts are set forth in Appendix A ("App."), *infra*.

STATEMENT OF THE CASE

A. Statement of Facts

1. Introduction

Respondent Bishop Paiute Tribe [1] (Tribe) is a federally recognized tribe of Indians that beneficially owns all the trust lands of the Bishop Paiute Reservation located in Eastern California and exercises governmental jurisdiction over its Reservation. Most residents of the 875-acre Reservation are tribal members. The Tribal Council, elected by the Tribe's voters, governs the Reservation pursuant to tribal codes, resolutions, policies and procedures, tribal custom and applicable federal law. The Tribe owns the Bishop Paiute Gaming Corporation (Corporation), the other Respondent, which is a corporation chartered under the laws of the Tribe. The Corporation operates a casino, known as the Paiutē Palace Casino, on the Reservation.

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[1] While the Bishop Paiute Tribe refers to itself as "the Bishop Paiute Tribe"—as did the District Court and the Court of Appeals in the proceedings below—Petitioners identify the Tribe by another name in the Petition. Unless stated otherwise in the text, the term "Tribe" shall refer both to the Bishop Paiute Tribe and the Bishop Paiute Gaming Corporation.

2. Operation of tribal casino pursuant to IGRA

The Tribe's casino employs approximately 140 persons, of whom approximately 80 percent are Native American, mostly tribal members. It is the principal source of employment and revenue for the Tribe and its members.

Casino gaming by Indian tribes is regulated as provided in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, enacted by Congress in 1988 after this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). IGRA allows tribes to conduct casino-style games—defined as class III games in the Act, 25 U.S.C. § 2703(8)—on Indian lands *only* if the tribe negotiates a compact with the state setting forth the terms and conditions for the operation of the games. 25 U.S.C. § 2710(d)(1)(C), (3) (App. 3a-4a).

Pursuant to IGRA, the Tribe and the State of California negotiated and, on December 9, 1999, executed a Tribal-State Gaming Compact (Compact) authorizing and establishing provisions for regulation of casino-style games on the Bishop Paiute Reservation. (ER [2] 189). The Compact became effective May 16, 2000 when it was approved by the Secretary of the Interior, as IGRA requires. 25 U.S.C. § 2710(d)(1)(C), (3) (App. 3a-4a); 65 Fed. Reg. 31,189 (May 16, 2000) (ER 345).

The Compact requires the casino to provide the State Gaming Agency access to all "papers, books, and records" of the casino for inspection and copying, and provides that the State Gaming Agency (the California agency or agencies delegated duties under the Compact) may retain such records and copies "as reasonably necessary for completion of any investigation of the Tribe's compliance with this Compact." Compact § 7.4.3(a) (ER 166). The Compact provides that these records and copies remain the property of the Tribe, and

[2] "ER" refers to excerpts of record filed with the Court of Appeals.

requires that the State Gaming Agency preserve their confidentiality. *Id.* at § 7.4.3(b) (ER 166-167). While the Compact provides that the State and Tribe shall establish protocols for sharing with law enforcement officers information learned in background investigations, *id.* § 7.4.3(b)(ii) (ER 167), there is no provision requiring the release of casino personnel records to county law enforcement officials engaged in enforcing state welfare laws.

Many years prior to opening the casino, the Tribe established and implemented policies limiting access to records of all tribal employees in order to encourage disclosure of relevant information to the Tribe by its employees and to protect their privacy interests. As the Court of Appeals found, these policies are based on and similar to federal and state laws governing public records and personnel information related to government employees. Pet. at 20a, 23a.

3. County officials' seizure of tribal personnel records

In February, 2000, the Tribe received a request for payroll records related to three casino employees, all tribal members, from the Inyo County District Attorney's Office, related to the County's investigation into possible welfare fraud. The Tribe responded that its long-standing policy prohibits disclosing personnel information without the written consent of the employee to whom the records relate, and therefore it could not provide the requested records.[3]

On March 23, 2000 the California Superior Court for the County of Inyo issued a search warrant authorizing the sheriff

[3] Without citing to the record, Petitioners allege that the Tribe has provided similar information in the past pursuant to informal requests and a warrant, Pet. at 4-5, which would have been contrary to established tribal policy. Respondents dispute this allegation.

to search the Tribe's casino and obtain the payroll records for these three employees. The warrant was based on an affidavit submitted by an investigator for the district attorney's office alleging that the employees had received welfare assistance from the Inyo County Department of Health and Human Services in excess of their eligibility because of a failure to fully disclose their earnings.

The district attorney's office and the sheriff executed the search warrant by entering the casino premises and, using deadbolt cutters, removed the locks used to secure the confidential records. Over the objections of the casino staff, they seized the time card entries, payroll registers, payroll check registers and quarterly payroll tax information [4] for these three employees, as well as seventy-eight other casino employees. The district attorney and sheriff did not provide casino staff with the opportunity to redact the names and information regarding the employees whose records were not within the terms of the search warrant.

In July 2000, the district attorney requested personnel records for six additional casino employees who were also tribal members. In an effort to accommodate the district attorney's request and still adhere to its policies, the Tribe stated that it could accept the consent provided by an employee on the welfare application by way of a redacted copy of the last page of the welfare application submitted by the employee. The district attorney refused to provide these documents.

B. Proceedings below

Faced with the threat of another search warrant, the Tribe brought this action in District Court for declaratory and

[4] The Tribe had already provided the State with much of the information in the seized records by completing and submitting forms prepared by the California Franchise Tax Board regarding wage withholdings. *See* Pet. at 3.

injunctive relief against the County and county officials asserting that they exceeded their authority under federal law. The Tribe also sought damages pursuant to 42 U.S.C. § 1983 on the ground that the County and its officials violated its rights under the Fourth Amendment of the United States Constitution. The Tribe also challenged the validity of Public Law 280, 18 U.S.C. § 1162(a) (hereinafter "Public Law 280").

The District Court dismissed the suit, and the Tribe appealed. The Court of Appeals for the Ninth Circuit affirmed in part and reversed in part. The Court of Appeals affirmed rejection of the challenge to Public Law 280. It granted the Tribe declaratory and injunctive relief, holding that the County and county officials violated the Tribe's sovereign immunity and its right under federal law to make its own laws and be ruled by them free from state interference.

Noting that "[a]bsent a waiver of sovereign immunity, tribes are immune from processes of the court," Pet. at 18a, the Ninth Circuit determined that Public Law 280 did not authorize the warrant, because that Act "was designed to address the conduct of individuals rather than abrogate the authority of Indian governments over their reservations" and did not waive tribal sovereign immunity or grant states jurisdiction over tribes. Pet. at 17a, 19a (citing *Bryan* v. *Itasca County*, 426 U.S. 373, 389 (1976)). The Court of Appeals rejected the County's argument that this Court's decisions construing the scope of tribal authority over non-Indians controlled the question presented here—the extent of state authority over the Tribe itself and its property. *Id.* at 19a.

The Court of Appeals also held that the search warrant violated "the more fundamental right of the Tribe not to have its policies undermined by the states and their subdivisions." *Id.* at 20a (citing *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)). The Ninth Circuit found that

"[t]he Tribe established reasonable policies concerning the confidentiality of employee records, which in many instances were based on federal and state guidelines." *Id.* at 20a. The Ninth Circuit explained that "[t]he enforcement of tribal policies regarding employee records is an act of self-government because it concerns the disclosure of tribal property and because it affects the Tribe's main source of income." *Id.* at 23a. Accordingly, the Court of Appeals held that the execution of the search warrant interfered with "'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 20a (quoting *Williams v. Lee*, 358 U.S. 217, 220 (1959)).

The Court of Appeals also determined that the county officials had less intrusive means available to them to enforce state welfare laws:

> The Tribe offered several alternatives to the execution of a search warrant in order to assist the District Attorney in his investigation. Most clearly, the County could have followed the Tribe's policies as to confidential tribal records and allowed the Tribe to seek consent from the three employees before disclosing their files. The Tribe also offered to accept, as evidence of a release of the records, a redacted copy of the last page of the welfare application that clearly indicates that employment records for individuals seeking public assistance were subject to review by county officials. However, the District Attorney refused this offer.

Pet. at 25a-26a.

The Court of Appeals held that the county officials acted on behalf of the County for purposes of Section 1983 liability. Pet. at 35a-38a (relying on *Pitts v. County of Kern*, 949 P.2d 920 (Cal. 1998), and *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993)).

Finally, the Court of Appeals held that the county officials were not entitled to qualified immunity. Pet. at 38a. Applying this Court's standards for qualified immunity, *see Saucier v. Katz*, 533 U.S. 194 (2001), the court first held that the Petitioners' obtaining and execution of the search warrant violated the Fourth Amendment because it exceeded the County's jurisdiction. The court below then determined that that the law was sufficiently clear that a reasonable officer would have known that he had no jurisdiction to search and seize a Tribe's personnel records as part of a criminal investigation of an individual Indian. Pet. at 6a-7a.

The County's request for a rehearing *en banc* was denied. Pet. at 8a. During the pendency of the appeals, the district attorney voluntarily dismissed the criminal proceedings against the three casino employees "due to lack of probable cause." Resp. to Pet. Reh. En Banc at 5 n.1.

SUMMARY OF ARGUMENT

1. The decision below holds that the County and its officials violated the Tribe's sovereign immunity and right to self-government when they obtained and executed a search warrant issued by a state court seizing personnel records of the Tribe's casino enterprise. The opinion is a thoughtful, well-reasoned and routine application of this Court's precedents clearly establishing that, absent their consent or Congressional authorization, Indian tribes are immune from state court process and are protected from state interference with their right to govern themselves. *E.g., Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 U.S. 751, 756 (1998); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509-11 (1991); *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 891 (1986); *Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-73 (1977); *Bryan v. Itasca County*, 426 U.S. 373, 389 (1976); *Williams v. Lee*, 358 U.S. 217, 220 (1959).

This Court has held that federal law does not authorize states to regulate Tribes' gaming enterprises. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 212-14 (1987). Following *Cabazon*, Congress enacted the IGRA, 25 U.S.C. §§ 2701-2721, comprehensively regulating Indian gaming and requiring tribes that operate casinos to enter into compacts with states concerning the terms and conditions of casino operation. California's Compact with the Tribe accords the State considerable authority over casino operations, including access to certain records, but does *not* require the Tribe to provide employee personnel records to state or county officials investigating possible violations of state welfare laws.

Finally, the decision below is consistent with this Court's precedents in *Nevada v. Hicks*, 533 U.S. 353 (2001), and *Montana v. United States*, 450 U.S. 544 (1981). Those cases limit the governmental authority of tribes and tribal courts over nonmembers of the tribe, including state officials. *Hicks*, for example, sustained a search of an individual Indian's home pursuant to a state court warrant, not assertion of a state's authority over a tribe. This case, moreover, does not involve any assertion of tribal governmental authority over any state official or other nonmember. Instead, it concerns protecting from state interference a tribe's ability to control its members and economic enterprise on its reservation, which are internal affairs of the Tribe.

2. The decision below is also consistent with this Court's precedents under 42 U.S.C. § 1983. There is no basis for the Court to consider Petitioners' challenge, raised for the first time here, to review the Court of Appeals' finding that the Tribe is a "person" entitled to bring an action under Section 1983. There is no Circuit split. Finally, the search and seizure carried out in excess of Petitioners' jurisdiction and in violation of the Tribe's rights to immunity and self-government were unreasonable under the Fourth Amendment and actionable under Section 1983.

The court below determined that Petitioners are not entitled to qualified immunity, applying the two-part test established by this Court in *Saucier v. Katz*, 533 U.S. 194, 207-08 (2001). After finding that Petitioners had violated the Fourth Amendment, the Court of Appeals determined that the law was clearly established such that a reasonable officer in these circumstances would understand that his or her conduct violates the law. In applying this standard, the Ninth Circuit relied principally on its decision in *United States v. James*, 980 F.2d 1314, 1320 (9th Cir. 1992), and the decision in *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, 1508 (S.D. Cal. 1992), *aff'd*, 54 F.3d 535, 543-44 (9th Cir. 1995). There is no reason for this Court to review the Ninth Circuit's application of this Court's standards, which in any event was correct.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW FOLLOWS WELL-ESTABLISHED FEDERAL INDIAN LAW PRECEDENTS OF THIS COURT

The writ should be denied because the decision below does not involve any important question of federal law which has not been settled by this Court. Rather, the court below correctly applied firmly established and long-standing Indian law precedents of this Court.

A. This Court has consistently reaffirmed tribal sovereign immunity from compulsory state court process

This Court has consistently held that tribes, like other sovereigns, enjoy immunity from suit absent their consent or authorization by Congress. *E.g.*, *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) ("Indian Nations are exempt from suit without Congressional authorization."); *Santa Clara Pueblo v. Martinez*, 436 U.S.

49, 58 (1978) ("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers.") (citations omitted). The Court has found that tribal sovereign immunity is a "necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes of Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890 (1986). In 1998 the Court reiterated that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998). The Court applied the doctrine again recently in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001).

In *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991), the Court explained that:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, . . . Congress has consistently reiterated its approval of the immunity doctrine. See, e.g., Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 et seq., and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 et seq. These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

In *Kiowa* the Court noted that the tribal immunity doctrine is "settled law" and once again declined an invitation to revise

it, citing Congress' past reliance on it and power to alter it. 523 U.S. at 756, 758-59.[5]

On repeated occasions, the Court has specifically held that the immunity doctrine protects tribes against compulsory orders of state courts. *See Kiowa, supra*; *Three Affiliated Tribes, supra; Puyallup Tribe v. Dept. of Game of State of Washington*, 433 U.S. 165, 172-73 (1977); *see also Citizen Band of Potawatomi, supra*. In *Kiowa* the Court applied the rule that "tribal immunity is a matter of federal law and is not subject to diminution by the States" and held that a tribe could not be sued in state court in a contract action absent its consent or congressional authorization. 523 U.S. at 756. The Court specifically held that tribal immunity is not limited to governmental activities or even to activities on the reservation. *Id.* at 755.

In *Three Affiliated Tribes*, the Court made clear that "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." 476 U.S. at 891. The Court struck down a state statute conditioning the availability of state courts to tribes and Indians for civil claims on the waiver by the Tribe of sovereign immunity for all civil suits, holding the statute "unduly intrusive on the Tribe's common law sovereign immunity, and thus on its ability to govern itself according to its own laws." *Id.* at 891.

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[5] While it is true that the Court in *Kiowa* expressed concerns about the tribal sovereign immunity doctrine, *see* Pet. at 11-13, the Court unequivocally declined to modify this doctrine and instead concluded that the matter was best resolved by Congress. 523 U.S. at 758-60. At the time of the *Kiowa* decision, Congress was considering proposed legislation limiting the scope of tribal sovereign immunity, and it has considered similar proposals since. *See* S. 613, 106th Cong. (1999); S. 615, 106th Cong. (1999); S. 1691, 105th Cong. (1998); S. 2097, 105th Cong. (1998). Congress has never enacted this proposed legislation.

In *Puyallup Tribe*, which involved the exercise of treaty fishing rights by tribal members, the Court applied the principle that, "[a]bsent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." 433 U.S. at 172. The Court invalidated a Washington state court order directing the Tribe to file with the court a list of tribal members authorized to exercise treaty fishing rights and the number of fish caught by such fisherman because it infringed on the Tribe's sovereign immunity and exceeded the state court's jurisdiction. The Court expressly distinguished between the power of the state court [6] to issue orders against individual tribal members and against the Tribe, holding that the state court had jurisdiction over the former but not the latter. *Id.* at 171-72.

This Court has also held that Congress did not confer jurisdiction on states over tribes or abrogate tribes' immunity from suit in state courts when it enacted Public Law 280. In Public Law 280, Congress extended the jurisdiction of certain states, including California, over criminal offenses by individual Indians on Indian reservations, and over civil actions involving Indians arising on reservations. But this Court has held that in Public Law 280 "there is notably absent any conferral of state jurisdiction *over the tribes themselves*." *Bryan v. Itasca County*, 426 U.S. at 389 (emphasis supplied). In *Three Affiliated Tribes*, the Court repeated: "[w]e have never read Pub.L. 280 to constitute a waiver of tribal sovereign immunity, nor found Pub.L. 280 to represent an abandonment of the federal interest in guarding Indian self-governance." 476 U.S. at 892.

[6] Washington, like California, is a Public Law 280 state. *Id.* at 175 n.14.

The Court again explained in *Kiowa* that statutes permitting state regulation of tribal or Indian activities do not affect the immunity of the Tribe itself, explaining:

> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *see also Organized Village of Kake v. Egan*, 369 U.S. 60, 75 (1962). To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S. at 510. There is a difference between the right to demand compliance with state laws and the means available to enforce them. *See id.* at 514.

523 U.S. at 755; *see also Citizen Band Potawatomi*, 498 U.S. at 513 ("We have never held that Public Law 280 is independently sufficient to confer authority on a State to extend the full range of its regulatory authority, including taxation, over Indians and Indian reservations.").

This Court's precedents[7] discussed above clearly establish that the Tribe and its tribal enterprise are immune from

[7] California courts, including the California Supreme Court and the court of appeals for the district including Inyo County, have also repeatedly recognized and applied the tribal immunity doctrine, *see Boisclair v. Superior Court*, 801 P.2d 305, 276 Cal.Rptr. 62, 72-73 (Cal. 1990); *Trudgeon v. Fantasy Springs Casino*, 84 Cal.Rptr.2d 65, 69 (Cal.Ct.App. 1999); *Long v. Chemehuevi Indian Reservation*, 171 Cal.Rptr. 733, 734-35 (Cal.Ct.App. 1981), and have specifically held that state courts lack jurisdiction over tribes themselves. *Trudgeon*, 85 Cal.Rptr.2d at 71; *Chemehuevi*,171 Cal Rptr. at 735.

compulsory process of state court, and compel the decision below that the state court's search warrant was in excess of its jurisdiction.[8]

B. The decision below is consistent with this Court's decisions holding that states may not interfere with tribes' rights to self-government

Petitioners' claim that the Ninth Circuit decision conflicts with *United States v. Wheeler*, 435 U.S. 313 (1978), Pet. at 16, is mistaken. Like *Wheeler*, this case involves a tribe's power over its internal affairs, specifically protection from state intrusions into a tribe's operation of a vital tribal enterprise essential to its economic advancement, and its promulgation of personnel rules governing employment of its own members in that enterprise.

In *Wheeler*, this Court held that the United States could prosecute an Indian under the Indian Major Crimes Act, 18 U.S.C. § 1153, where the defendant had previously been convicted of an offense arising out of the same incident in a tribal court. The Court held the federal prosecution did not constitute double jeopardy, because the "tribal and federal prosecutions are brought by separate sovereigns." 435 U.S. at 329-30. This was so, the Court reasoned, because Indian tribes have inherent powers to function as self-governing communities that are not derived from a delegation of authority from the United States. *Id.* at 322-27. The Court in *Wheeler* confirmed that tribes retain the power "of regulating their internal and social relations," *id.* at 322 (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)), and that "[t]heir right of self-government includes the right to prescribe laws applicable to tribe members." 435 U.S. at 322. By contrast, as this Court observed in *Wheeler*, "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe." 435 U.S. at 326.

In this case, as in *Wheeler*, the Tribe is simply exercising its right to self-government to adopt its own laws and apply them to its members, as well as to a tribally owned enterprise on its Reservation. Like the United States, *see* 5 U.S.C. §§ 552, 552a, and many states, *see Detroit Edison Company v. National Labor Relations Board*, 440 U.S. 301, 318 n.16 (1979),[9] including California, Cal. Gov't Code §§ 6250, 6254(c), the Tribe's policies prohibit release to third parties of personnel records or information without the written consent of the employee to whom the records relate. Such policies are necessary for encouraging full and accurate disclosure of relevant information by tribal employees in matters related to their employment as well as for protecting employees' privacy interests.

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[8] The decision below is consistent with cases holding that state courts may not require federal employees to comply with state subpoenas except as permitted by federal regulation or other waiver of immunity. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951); *In re Elko County Grand Jury*, 109 F.3d 554 (9th Cir. 1997); *Edwards v. U.S. Department of Justice*, 43 F.3d 312 (7th Cir. 1994); *Boron Oil Co. v. Downie*, 873 F.2d 67 (4th Cir. 1989).

[9] In *Detroit Edison* the Court found:

> A person's interest in preserving the confidentiality of sensitive information contained in his personnel files has been given forceful recognition in both federal and state legislation governing the record keeping activities of public employers and agencies. *See e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (written consent required before information in individual records may be disclosed unless the request falls within explicit statutory exception) . . . See also U.S. Privacy Protection Study Comm'n, Personal Privacy in an Information Society (1977) (recommending that all employers should be under a duty to safeguard the confidentiality of employee records).

440 U.S. at 318, n. 16 (citations omitted).

Tribes' right to govern internal tribal affairs such as these is firmly rooted in this Court's precedents. As the Supreme Court held in the historic Cherokee cases, an Indian tribe is a "distinct political society . . . capable of managing its own affairs and governing itself," *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831), and retains the "right of self-government," free from state interference. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556-57 (1832). While the Court has modified the principles in the Cherokee cases in matters involving tribal authority over non-Indians, *e.g.*, *Wheeler*, 435 U.S. at 326, it has consistently recognized that with respect to its members on its reservation, tribes have "the right . . . to make their own laws and be ruled by them," and that state action may not infringe upon that right. *Williams v. Lee*, 358 U.S. 218, 220 (1959); *see also Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 470, 502 (1979); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141-43 (1980); *Fisher v. District Court*, 424 U.S. 382, 386 (1976); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171-73 (1973).

C. The decision below is also consistent with this Court's decisions and the actions of Congress in the Indian gaming area

In the specific area of tribal gaming enterprises, this Court has rejected California's attempt under Public Law 280 to enforce state regulatory law against a tribally-operated bingo parlor on reservation lands. *Cabazon*, 480 U.S. at 221-22. In *Cabazon*, the Court rejected an argument strikingly similar to one the Petitioners make here, Pet. at 9-10, 15, that application of state laws to tribal casinos is essential to avoid lawless enclaves within a state, holding:

> We conclude that the State's interest in preventing the infiltration of the tribal bingo enterprises by organized crime does not justify state regulation of the tribal bingo enterprises in light of the compelling federal and tribal interests supporting them. State regulation would impermissibly infringe on tribal government, and this conclusion applies equally to the county's attempted regulation of the Cabazon card club.

480 U.S. at 221-22.

The Court in *Cabazon* emphasized the importance of tribally-run gaming operations for tribes' achieving federal goals of economic self-sufficiency. After discussing "the congressional goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development," *id.* at 216, the Court in *Cabazon* concluded that "[s]elf-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id.* at 219.

Here, as in *Cabazon*, the Bishop Paiute Reservation "contain[s] no natural resources which can be exploited." *Id.* at 218. The casino games provide the principal "source of revenues for the operation of the tribal government[ ] . . . and the provision of tribal services. They are also the major source[ ] of employment" on the Reservation. *Id.* at 218-19. The State of California itself has agreed that "Indian gaming has become the single largest revenue-producing activity for Indian tribes" and that it promotes "tribal economic development, and generate[s] jobs and revenues to support the Tribe's government and governmental services and programs." Compact, Preamble § D, § 1(b) (ER 146-47).

Furthermore, Petitioners' claim that the decision below will interfere with law enforcement fails because tribal gaming is also subject to substantial regulation pursuant to federal law.[10] Immediately after *Cabazon*, Congress enacted the

[10] Petitioners' claim that the decision below may affect the ability of federal law enforcement to obtain evidence from tribal property, Pet. at 10, is entirely speculative and unsupported.

IGRA, a comprehensive regulatory scheme governing tribal casinos. Congress in the IGRA required tribes conducting class III gaming (*i.e.*, casino games)—including the Bishop Paiute Tribe—to conclude compacts with states on the terms and conditions governing such gaming.

The Tribe's Compact with California contains a broad range of provisions governing the Tribe's casino. These include the licensing of casino employees.[11] Under the Compact, the Tribal Gaming Commission has the primary responsibility for conducting background investigations and making suitability determinations, subject to oversight by a federal agency established by IGRA—the National Indian Gaming Commission—*and a separate licensing procedure by the State of California*. 25 U.S.C. § 2710(c)(1), (2); 25 C.F.R. § 558.4; Compact § 6.5.6 (ER 163-65). Employees must disclose all relevant information to the Tribal Gaming Commission, 25 C.F.R. § 556.4 (App. 6a-9a), which is responsible for the day-to-day oversight and enforcement of applicable gaming laws on the Reservation. Compact. § 7.1 (ER 165). The State Gaming Agency receives such information and has acknowledged and agreed that this information is confidential and may only be released with the consent of the employee. Compact § 6.4.8 (ER 161) (requiring releases from employees permitting furnishing of background information to State Gaming Agency); § 7.4.3(b) (ER 167) (requiring the State Gaming Agency to "exercise utmost care in the preservation of the confidentiality of any and all information and

[11] IGRA and its implementing regulations and the Compact also require nearly all employees of the casino to obtain and maintain current a gaming license as a condition of employment in the casino. 25 U.S.C. § 2710(b)(2)(F), (c), (d)(1)(A)(ii); 25 C.F.R. parts 556 and 558; Compact § 6.4.4 (ER 157-58). As a part of the licensing process, casino employees are also subject to a rigorous background investigation into their criminal (if any), financial, employment and residential history, as well as personal and professional references, in order to permit a determination regarding their suitability for employment in the casino. *Id.*

documents received from the Tribe and . . . apply the highest standards of confidentiality expected under state law to preserve such information and documents from disclosure"); § 7.4.3(c) (records received from Tribe in compliance with the Compact are exempt from disclosure under California Public Records Act).

The Compact also establishes standards for public and workplace health and safety, including standards for food and beverage handling and water quality, and allows state inspections to enforce these standards. Compact §§ 7.4, 10.2(a), (b), (e) (ER 166, 174-75). The Compact also prescribes standards and procedures concerning tort liability, employment discrimination, check cashing, workers' compensation insurance, unemployment insurance, withholding state income taxes for certain employees, and labor relations. For example, with respect to unemployment compensation benefits, it provides:

> The Tribe agrees that its Gaming Operation will participate in the State's program for providing unemployment compensation benefits and unemployment compensation disability benefits with respect to employees employed at the Gaming Facility, including compliance with the provisions of the California Unemployment Insurance Code, and the Tribe consents to the jurisdiction of the state agencies charged with the enforcement of that Code and of the courts of the State of California for purposes of enforcement.

Compact § 10.3(b) (ER 176).

The Tribe's casino is subject to regulation by the Federal government as well. The National Indian Gaming Commission has the authority to promulgate regulations enforcing the Act on Indian lands, 25 U.S.C. § 2706 (b)(10) (App. 1a), review and approve tribal gaming laws and certain contracts, *id.* § 2712, inspect Indian gaming facilities for compliance,

id. at §§ 2706 (b)(1), (2) (App. 1a), and issue fines and order closure of gaming facilities for violations. *Id.* § 2713 (App. 4a-5a). The National Indian Gaming Commission is required to provide relevant information to other law enforcement officials. *Id.* § 2716(b) (App. 6a).[12]

Significantly for present purposes, the Compact between the Tribe and State does *not* require the Tribe to provide employee personnel records to State or County officials investigating violations of state welfare law. Petitioners, moreover, have ample remedies to obtain these records other than by a search warrant directed to the Tribe. *See Citizen Band Potawatomi,* 498 U.S. at 514 ("sovereign immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives"). As the Court of Appeals determined, the Petitioners could have obtained a search warrant on the property of the individual tribal employees under investigation or could have

[12] The assertions that the decision below will hinder law enforcement are greatly overstated for reasons beyond the federal interest in and regulation of gaming. First, the claim that the decision below may prevent law enforcement from seizing stolen property and arresting suspects in a tribal casino or obtaining witness testimony from casino employees goes well beyond the Ninth Circuit holding, which involved tribally-owned records seized in contravention of established tribal policy. It did not involve criminal suspects in a casino or employee witnesses. Furthermore, these arguments incorrectly presuppose that tribal governments have not established laws or policies aimed at investigating and prosecuting criminal violations. As stated in the Compact, "[t]he Tribe and the State share a joint sovereign interest in ensuring that tribal gaming activities are free from criminal and other undesirable elements." Compact, Preamble § F (ER 146). Many tribes have established police forces, *see Hicks,* 533 U.S. at 356 (describing cooperation between tribal police and state game warden); *Strate v. A-1 Contractors,* 520 U.S. 438, 456 n. 11 (1997) (describing tribal police activities); *Wheeler,* 435 U.S. at 314 (same), including in California, *see Moore v. Nelson,* 270 F.3d 789, 790 (9th Cir. 2001), and have entered into cooperative agreements with local and state law enforcement. *See infra* note 14.

provided the Tribe with the consent of the employees for the release of the records found in the welfare application that the Tribe indicated that it was willing to accept. Pet. at 25a. The State might also seek to amend the Compact to add provisions governing the sharing of this kind of information in the possession of a tribal casino.[13] Alternatively, the County could seek to negotiate a cooperative intergovernmental agreement with the Tribe concerning the exchange of records and sharing of resources needed for effective law enforcement concerning welfare fraud.[14]

D. The decision below is consistent with *Nevada v. Hicks* and *Montana v. United States*

Petitioners also argue, Pet. at 16, that the decision below conflicts "in principle, if not directly" with *Nevada v. Hicks,* 533 U.S. 353 (2001), and *Montana v. United States,* 450 U.S. 544 (1981). However, *Montana* and *Hicks* limit the regulatory and adjudicatory authority of tribes and tribal courts over non-Indians. By contrast, this case does not involve tribal governmental authority of any kind over non-Indians. It concerns a tribe's control over its members and economic enterprise, which are internal tribal affairs.

[13] The Compact has a term of twenty years, but may be amended at any time by agreement of the parties. Compact §§ 11.2.1, 12.1 (ER 179). Certain provisions are specifically subject to renegotiation prior to the expiration of the term. *Id.* §§ 10.8.3(b), 4.3.3, 12.2 (E.R. 176, 152-153, 179).

[14] "Some States have formally sanctioned the creation of tribal-state agreements," and "there are a host of cooperative agreements between tribes and state authorities to share control over tribal lands, to manage public services, and to provide law enforcement." *Hicks,* 533 U.S. at 393 (O'Connor, J., concurring) (citations omitted); *see also People v. Superior Court (Jans),* 274 Cal.Rptr. 586, 587 (Cal. Ct. App. 1990) (holding that Indian tribe comes within Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Cal. Pen. Code §§ 1334-1334.6).

1. *Nevada v. Hicks*

Nevada v. Hicks allowed the search of an individual tribal member's home pursuant to a state court search warrant. It did not involve any assertion of state authority over a tribe itself, nor any question of tribal immunity from state court process. 533 U.S. at 363.

More specifically, *Hicks* concerned "whether a tribal court may assert jurisdiction over civil claims against state officials who entered tribal land to execute a search warrant against a tribe member suspected of having violated state law outside the reservation." *Id.* at 355. In *Hicks*, an individual tribal member residing on an Indian reservation brought trespass, tort and civil rights claims (including claims under 42 U.S.C. § 1983) *in tribal court* against state law enforcement officials and the State of Nevada for searching his home pursuant to a warrant issued by a state court. Applying *Strate* 520 U.S. at 438, and *Montana*, 450 U.S. at 565, this Court held that the tribal court lacked jurisdiction over the State and state officials. *See Hicks*, 533 U.S. at 358, 374.

The Court stated in *Hicks* that "[*s*]*elf*-government and *internal* relations are not directly at issue here, since the issue is whether the Tribe's law will apply, not to their own members, but to a narrow category of outsiders." *Id.* at 371 (emphasis in original); *see also id.* at 378 (concurring opinion of Justice Souter quoting *Montana*, 450 U.S. at 564, for the proposition that tribes' inherent governmental authority is preserved over members of a tribe, but generally not over nonmembers); *id.* at 386 (concurring opinion of Justice Ginsburg emphasizing that "the holding in this case is limited to the question of tribal-court jurisdiction over state officers enforcing state law"); *id.* at 391 (concurring opinion of Justice O'Connor contrasting the "nearly absolute tribal sovereignty over tribe members" with tribes' limited sovereignty over nonmembers); *County of Yakima v. Yakima Indian Nation*, 502 U.S. 251, 267 (1992) (noting the

distinction between this Court's precedents involving the extent of tribal authority over non-Indians and state authority on Indian lands).

The present case, as noted, involves a tribe's authority over its members and economic affairs, as well as its immunity from compulsory state process. Unlike *Hicks*, moreover, this suit was brought in *federal* (not tribal) court to protect the Tribe's rights under federal law. As this Court recognized in *Hicks*:

> [W]here the issue is whether the [state law enforcement] officer has acted unlawfully in the performance of his duties, the tribe and tribe members are of course able to invoke the authority of the . . . federal courts . . . to vindicate constitutional or other federal . . . law rights.

533 U.S. at 373.

2. *Montana v. United States*

Similarly, *Montana* concerned "the power of an Indian tribe to regulate hunting and fishing by non-Indians on lands within its reservation owned in fee simple by non-Indians." 450 U.S. at 547. It did not involve state authority over a tribe or tribal enterprise on a reservation.

Montana holds that tribes generally have no civil jurisdiction over nonmembers on fee-patented lands or their equivalent, except that "Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians" in two circumstances: (1) where nonmembers "enter consensual relationships with the tribe or its members," or engage in "conduct [that] threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." 450 U.S. at 565-66. The decision below does not conflict with *Montana* because it does not involve tribal governmental authority of any sort over nonmembers.

II. NONE OF THE PETITIONERS' CLAIMS UNDER 42 U.S.C. § 1983 MERIT REVIEW BY THIS COURT

A. Section 1983 is available to vindicate violations of a tribe's rights under the Constitution

1. The Tribe is entitled to bring a Section 1983 claim

Petitioners challenge the Court of Appeals' holding, claiming that an Indian tribe is not a "person" within the meaning of Section 1983. Pet. at 25. This challenge fails for several reasons. First, it was not raised before the Court of Appeals and therefore is not properly raised here. *See Bragdon v. Abbott*, 524 U.S. 624, 638 (1998) (Court practice is "to decide cases on the grounds raised and considered in the Court of Appeals").[15] Second, Petitioners provide no basis for this Court to review this issue. They assert no conflict with a decision of this Court nor any split among the Circuits. Indeed, Petitioners only cite one case—*American Vantage Companies, Inc. v. Table Mountain Rancheria*, 292 F.3d 1091, 1097 (9th Cir. 2002)—which involved whether an unincorporated tribe is a "citizen" of a state for purposes of federal diversity jurisdiction, not whether a tribe can bring suit under Section 1983.[16] When the Ninth Circuit directly

[15] While the Petitioners made the argument below that Section 1983 was not available for claims of violation of the Tribe's right to self-government and sovereign immunity, they did not challenge the ability of the Tribe or Bishop Paiute Gaming Corporation to bring constitutional claims under Section 1983. Pet. for Reh. En Banc at 15-16.

[16] The court in *American Vantage Companies, Inc.* cited the dissent in *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 865 n.16 (9th Cir. 1987), which expresses doubt whether a tribe as a sovereign comes within the meaning of "person" entitled to bring actions under Section 1983. Pet. at 25. However, the dissent in *Williams* opines that a tribe may

addressed the question, it held that tribes *are* persons for purposes of Section 1983.[17] *Native Village of Venetie v. Alaska*, 155 F.3d 1150, 1152 n.1 (9th Cir. 1998); *see also Shakopee Mdewakanton Sioux Community v. City of Prior Lake*, 771 F.2d 1153, 1159 (8th Cir. 1985) (affirming award of damages to tribe for action brought under Section 1983).

Finally, Petitioners' argument fails to account for the presence of the Bishop Paiute Gaming Corporation as a plaintiff in this case. It is well established that a corporation is a "person" within the meaning of the Fourteenth Amendment, *see Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n. 9 (1985), and may vindicate its constitutional rights by suing under Section 1983.[18] *See, e.g., Barrett v. United States*, 689 F.2d 324, 333 (2nd Cir. 1982); *Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 16 (1st Cir. 1979); *California Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 283 (9th Cir. 1974); *see also* Wright, Miller & Cooper,

bring a Section 1983 action based on its "proprietary, corporate activities." 810 F.2d at 865 n. 16. The Bishop Paiute Gaming Corporation clearly has that capacity here.

[17] In *Monell v. Department of Social Services*, 436 U.S. 658 (1978), this Court construed "person" for purposes of Section 1983 broadly and held that "municipalities and other local government units" come within the definition. *Id.*at 690. In reaching the decision that a municipal corporation was a proper defendant under Section 1983, the Court relied on an Act of Congress which stated that "in all acts hereafter passed . . . the word 'person' may extend to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense." 436 U.S. at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431). There is no principled basis for concluding that the term "persons" who may be plaintiffs should not be construed as broadly as a "person" who may be defendants, and thus to include tribes.

[18] A corporation is also protected from unreasonable search and seizure by the Fourth Amendment. *Silverthorne Lumber v. United States*, 251 U.S. 385, 392 (1920).

Federal Practice and Procedure: Jurisdiction 2d § 3537.1 at 198 ("corporations have protected rights that may be vindicated by suit under § 1983").

2. Petitioners violated the Tribe's rights under the Fourth Amendment

Petitioners challenge the Court of Appeals' holding that the search warrant executed in violation of the Tribe's immunity from suit and right of self-government was also a violation of the Fourth Amendment actionable under Section 1983. Pet. at 26-27. The decision below correctly held that the search violated the Fourth Amendment because it was clearly unreasonable.

"The touchstone of the Fourth Amendment is reasonableness." *United States v. Knights*, 534 U.S. 112, 122 S.Ct. 587, 591 (2001). In this case, the warrant was void *ab initio* because the issuing court lacked jurisdiction over the Tribe. *See United States v. Scott*, 260 F.3d 512 (6th Cir. 2001) (search warrant signed by retired judge was void *ab initio*); *United States v. Strother*, 578 F.2d 397, 399 (D.C.Cir. 1978) ("a judicial officer's writ cannot run outside [the officer's] jurisdiction").

The analysis of reasonableness requires a balancing of the interests of the subject of the search against the interests urged to support the search, even in cases involving probable cause. *See Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985). The Court of Appeals held that the Tribe's firmly established rights to sovereign immunity and self-government outweighed the Petitioners' interests in the search, particularly in light of the alternate remedies available to the Petitioners to advance those interests. The Petitioners' obtaining and execution of the search warrant in violation of the Tribe's rights and in derogation of its policy was clearly the sort of "misuse of power," *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (quoting *Byars v. United States*, 273 U.S. 28, 33 (1927)), in matters of search and seizure that the Fourth

Amendment prohibits. *See Bissonnette v. Haig*, 800 F.2d 812, 813 (8th Cir. 1986), *aff'd per curiam for lack of quorum*, 485 U.S. 264 (1988) (search and seizure of Indians by U.S. armed forces on Indian reservation was unreasonable under Fourth Amendment in light of legal limits placed on use of military for civilian law enforcement).

Petitioners challenge the Ninth Circuit's determination that the search violated the Fourth Amendment chiefly by relying on *Nevada v. Hicks*, *supra*. Pet. at 22-24.[19] But Petitioners acknowledge that *Hicks* does not authorize search warrants against tribes, *id.* at 24, as distinct from individual Indians, and we showed in Part I.D.1 that *Hicks* does not apply here, because the Tribe is immune from compulsory state process and is not here asserting any governmental authority over Petitioners or any non-Indians.

Since the Ninth Circuit determined that Petitioners violated the Tribe's "rights, privileges, or immunities . . . secured by the Constitution," 42 U.S.C. § 1983, Section 1983 clearly applies. This is not a case where a claim is asserted to a "benefit" or "interest" under a federal statute. *Cf. Gonzaga University v. Doe*, ____ U.S. ____, 122 S. Ct. 2268, 2275 (2002); *Blessing v. Freestone*, 520 U.S. 329, 338 (1997).[20]

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[19] Petitioners also challenge the Court of Appeals decision below based on an alleged misinterpretation of California law regarding the territorial scope of the jurisdiction of state court judges and magistrates and peace officers. Pet. at 27-28. However, the conclusion challenged by Petitioners is nowhere to be found in the Court of Appeals' decision. It appears that Petitioners are referring to a portion of the initial opinion that was later withdrawn by the court below. *Id.* at 2a, 40a-41a.

[20] Petitioner claims that the Ninth Circuit's decision conflicted with its earlier holding in *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir 1989), Pet. at 26, but the Ninth Circuit specifically considered and distinguished *Nevins* because this case involved an unlawful search and seizure outside the officers' jurisdiction. Pet. 6a, n. 4. *Nevins*, by contrast,

B. The Court of Appeals correctly determined that Petitioners lacked qualified immunity

The Court of Appeals applied the two-part test established by this Court in *Saucier v. Katz*, 533 U.S. at 199, and considered "(1) whether the facts taken in the light most favorable to the plaintiff would establish a violation of the Fourth Amendment; and if so (2) whether the law was clearly established at the time such that a reasonable officer faced with the same circumstances would have known that the challenged conduct was unlawful." Pet. at 3a (citing *Saucier*, *supra* and *Robinson v. Solano County*, 278 F.3d 1007, 1013 (9th Cir. 2002) (en banc)).

As noted, the Ninth Circuit first found a Fourth Amendment violation because the warrant "was executed beyond the District Attorney's and Sheriff's jurisdiction." Pet. 3a-4a. As shown in Part II.A.2, that decision was correct under this Court's precedents. The Ninth Circuit then determined that qualified immunity does not apply here because the law was sufficiently clear and that at the time of the alleged conduct a reasonable officer faced with the same circumstances would have known that his or her conduct violates the law. The Court of Appeals applied this standard by relying on *United States v. James*, 980 F.2d 1314 (9th Cir. 1992), and *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp at 1508, as clearly establishing the law in the Ninth Circuit.[21] It determined these cases established clear rules that informed Petitioners that the search warrant was beyond their jurisdiction. Pet. at 4a-5a. As shown *supra* note 7, the

concerned the validity of a state tax on a non-Indian company doing business with a tribe on a reservation, not a violation of the Fourth Amendment.

[21] The Ninth Circuit also relied on the Tenth Circuit's decision in *United States v. Baker*, 894 F.2d 1144 (10th Cir. 1990). Pet. 5a-6a.

California courts have also repeatedly applied the tribal immunity doctrine and recognized the absence of state authority over tribes.[22]

Petitioners claim, Pet. at 28-29, that three other decisions—*Crow Tribe of Indians v. Racicot*, 87 F.3d 1039 (9th Cir. 1996), *United States v. Snowden*, 879 F.Supp. 1054 (D.Or. 1995), and *United States v. Verlarde*, 40 F.Supp.2d 1314 (D.N.M. 1999), *remanded*, 214 F.3d 1204 (10th Cir.2000)—are inconsistent with the Ninth Circuit's conclusion that the contours of the law were clearly established. Even if true, that furnishes no reason to grant the writ, since a "petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

In any event, the above cases do not support Petitioners' argument. *Crow Tribe* involved a search warrant obtained from a federal court by federal law enforcement officers to enforce federal gaming laws which contain an *express abrogation* of tribal immunity. 87 F.3d at 1044; 25 U.S.C. §§ 2710(d)(6), (7)(A)(ii). In *Snowden* and *Velarde*, the courts found that the tribe had *voluntarily waived its immunity* with respect to the records subject to subpoena. *Snowden*, 879 F.Supp. at 1057; *Velarde*, 40 F.Supp.2d at 1317. In *Snowden*,

[22] This is not a case of mistaken identity in the execution of a facially valid warrant as in *Baker v. McCollan*, 443 U.S. 137 (1979), but rather of a warrant that exceeded clearly established limits to state jurisdiction, as the Ninth Circuit determined. Indeed, the fact that the documents were plainly located in the Tribe's casino located on the Reservation and owned by the Tribe provided Petitioners with sufficient information to determine that the warrant was outside the court's jurisdiction. This Court has held that officials may not rely on a facially valid warrant by a judicial officer to avoid liability under Section 1983. *Malley v. Briggs*, 475 U.S. 335, 345 (1986) (officer is charged with knowing whether warrant requested reasonably established probable cause); *United States v. Leon*, 468 U.S. 897, 922-923 (1984) ("in some circumstances the officer will have no reasonable grounds for believing that the warrant was properly issued").

for example, the court relied on the consent to their disclosure by the tribal agency provided by the person to whom the records related. 879 F.Supp. at 1058.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX

STATUTORY PROVISIONS INVOLVED

1. The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721.

IGRA is the federal statute governing gaming activities by federally recognized Indian tribes.

25 U.S.C. §2706(b) Powers of Commission; monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission—

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

* * *

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

* * *

25 U.S.C. §2710(b) Tribal Gaming Ordinances; Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that—

* * *

(F) there is an adequate system which—

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes—(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses; (II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and (III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

25 U.S.C. §2710(c); Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

25 U.S.C. §2710(d); class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

* * *

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * *

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

* * *

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

* * *

(7)(A) The United States district courts shall have jurisdiction over—

* * *

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect.

25 U.S.C. § 2713(a) Civil Penalties; authority; amount; appeal; written complaint

(1) Subject to such regulations as may be prescribed by the commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal

regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that may result in the imposition of a fine under subsection (a)(1) of this section, the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

* * *

25 U.S.C. § 2716 Investigative Powers:

(a) Confidential information

Except as provided in subsection (b) of this section, the Commission shall preserve any and all information received pursuant to this chapter as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of Title 5.

(b) Provision to law enforcement officials

The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

2. 25 CFR §556.4 Background investigations.

A tribe shall perform a background investigation for each primary management official and for each key employee of a gaming operation.

(a) A tribe shall request from each primary management official and from each key employee of a gaming operation:

(1) Full name, other names used (oral and written), social security number(s), birth date, place of birth, citizenship, gender, all languages (spoken or written);

(2) Currently and for the previous 5 years: business and employment positions held, ownership interests in those businesses, business and residence addresses, and drivers license numbers;

(3) The names and current addresses of at least three personal references, including one personal reference who was acquainted with the applicant during each period of residence listed under paragraph (a)(2) of this section;

(4) Current business and residence telephone numbers;

(5) A description of any existing and previous business relationships with Indian tribes, including ownership interests in those businesses;

(6) A description of any existing and previous

business relationships with the gaming industry generally, including ownership interests in those businesses;

(7) The name and address of any licensing or regulatory agency with which the person has filed an application for a license or permit related to gaming, whether or not such license or permit was granted;

(8) For each felony for which there is an ongoing prosecution or a conviction, the charge, the name and address of the court involved, and the date and disposition if any;

(9) For each misdemeanor conviction or ongoing misdemeanor prosecution (excluding minor traffic violations) within 10 years of the date of the application, the name and address of the court involved and the date and disposition;

(10) For each criminal charge (excluding minor traffic charges) whether or not there is a conviction, if such criminal charge is within 10 years of the date of the application and is not otherwise listed pursuant to paragraph (a)(8) or (a)(9) of this section, the criminal charge, the name and address of the court involved and the date and disposition;

(11) The name and address of any licensing or regulatory agency with which the person has filed an application for an occupational license or permit, whether or not such license or permit was granted;

(12) A photograph;

(13) Any other information a tribe deems relevant; and

(14) Fingerprints consistent with procedures adopted by a tribe according to § 522.2(h) of this chapter.

(b) A tribe shall conduct an investigation sufficient to make a determination under § 558.2 of this chapter. In conducting a background investigation, a tribe or its agents shall promise to keep confidential the identity of each person interviewed in the course of the investigation.

(c) If the Commission has received an investigative report concerning an individual who another tribe wishes to employ as a key employee or primary management official and if the second tribe has access to the investigative materials held by the first tribe, the second tribe may update the investigation and update the investigative report under § 556.5(b) of this part.

3. 25 CFR §558.4 Granting a gaming license.

(a) If, within the 30-day period described in § 558.3(c) of this part, the Commission notifies a tribe that it has no objection to the issuance of a license pursuant to a license application filed by a key employee or a primary management official for whom the tribe has provided an application and investigative report to the Commission pursuant to § 558.3 (a) and (b) of this part, the tribe may go forward and issue a license to such applicant.

(b) If, within the 30-day period described in § 558.3(c) of this part, the Commission provides the tribe with a statement itemizing objections to the issuance of a license to a key employee or to a primary management official for whom the tribe has provided an application and investigative report to the Commission

pursuant to § 558.3 (a) and (b) of this part, the tribe shall reconsider the application, taking into account the objections itemized by the Commission. The tribe shall make the final decision whether to issue a license to such applicant.